IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

APPEAL FROM ORDER NO.81 OF 2004

1) M/s.Jaibharat Finance Corporation)
a Partnership firm duly registered)
under the Indian Partnership Act)
1932 having its office at 40-A)
Vijay Nagar Colony, Shukrawar Peth)
Pune 411 030.)

2) Shantilal Mulchand Kothari)
Age about 65 years, Occ.: Business)
residing at 40-A, Vijay Nagar Colony)
Shukrawar Peth, Pune-30.)

3) Mrs.Vimal Lalchand Mutha)
Age about 70 yrs., Occ.: Business)
residing at 567/14, Shukrawar Peth)
Pune 411 002.).. Appellants
(Org.Plaintiffs)

Versus

1) Piloo Eruch Aga)
Age : Adult, Occ.: Business)

2) Fareen Eruch Aga)
Age : Adult, Occ.: Business)

3) Viraf Dorab Manjra)
Age : Adult, Occ.: Business)

4) Beii Dorab Manjra)
Age : Adult, Occ.: Busienss)

5) Bhajadi Eruch Aga)
Age : Adult, Occ.: Business)

Nos.1 to 5 having their address at)
172, Chinchwad, Pune 411 019.)

6) M/s.Atharva Builders Pune Pvt. Ltd.)
a Company registered under the)
Companies Act, 1956 and having its)
office at "Madhukunj", 19/B, Pathak)
Baug, Navi Peth, Pune 411 030.)
By its representatives :)
a) Ajay Kadam)
Age : Adult, Occ.: Business)

b) Rajendra Kutte)
Age : Adult, Occ.: Business)

Nos.6(a) and (b) having their)
address at "Madhukunj", 19/B)
Phatak Baug, Navi Peth, Pune 411030.)

7) The Pune Municipal Corporation)
having its office at Shivaji Nagar)
Pune 411 005.)

8) The City Engineer)
Pune Municipal Corporation, Pune.)

9) The Assistant Engineer)
Building Regulation Department)
Pune Municipal Corporation, Pune.)

10) The Superintendent of Land Records)
Collector's office, Pune.)

11) Government of Maharashtra)
through the Collector of Pune.).. Respondents
(Org.Defendants)

Mr.R.D.Soni i/b.M/s.Ram & Co. for the Appellants.

Mr.A.V.Anturkar for Respondent No.1.

Mr.P.B.Kakade for Respondent No.5.

Mr.S.G.Page for Respondent No.6.

Mrs.G.P.Mulekar, Assistant Government Pleader,
for Respondent Nos.10 and 11.

CORAM: SMT.NISHITA MHATRE, J.

JUDGMENT RESERVED ON : 27TH OCTOBER 2004

JUDGMENT PRONOUNCED ON : 1ST_ DECEMBER 2004

JUDGMENT :

. By consent, Appeal heard finally at the stage of admission.

2. This Appeal From Order has been filed against the order dated 30th August 2003 passed by the 4th Joint Civil Judge, Senior Division, Pune below Exhibit 5 in Special Civil Suit No.792 of 2002, on an application for temporary injunction. The application filed by the Appellants-original Plaintiffs has been rejected.

3. The dispute in the present case has arisen because the Appellants-Plaintiffs claim to be the owners and in possession of the suit property bearing Survey No.15, Hissa No.7/3. According to the Appellants, they are the owners of the suit property which they have purchased in 1964 from one Bandopanth Malkaji Chillal. It is the case of the Appellants that the suit property was purchased by Appellant No.1 firm of which Appellant Nos.2 and 3 are partners. The property owned by Bandopanth Malkaji Chillal was numbered as Survey No.15, Hissa No.2/3. The Appellants claim that they have purchased the property bearing Survey No.15, Hissa No.2/3/4A by a registered sale deed dated 17th September 1964 from the original owner. The remainder of the property was purchased by a Co-operative Housing Society. Therefore, according to the Appellants, the entire property of the original owner Bandopath Malkaji Chillal was divided into two parts - one being Survey No.15, Hissa No.2/3/A which has been conveyed to them and the other part which is on the Northern side of the

property owned by the Appellants and marked as Survey No.15, Hissa No.2/3/B.

4. It appears that in 1981 a part of Survey No.15, Hissa No.2/3/B was purchased by one Aga Jamshed Framrose. The Appellants found that he was committing trespass upon their property and, therefore, filed Regular Civil Suit No.1725 of 1981 against Aga Jamshed Framrose for a permanent injunction. The heirs of Aga Jamshed Framrose are Defendant Nos.1 to 5 in the present Civil Suit and Respondent Nos.1 to 5 in the present Appeal. It appears that this Suit for injunction has been dismissed.

5. The Appellants claim that they realised that the Respondents were encroaching upon their property since they came across an advertisement in the daily Sakal on 5th May 2002. It was advertised that Respondent No.6 herein was to perform bhoomi puja at the suit property as Respondent Nos.1 to 5 had executed a Development Agreement with Respondent No.6. The Appellants have claimed that false records have been created by Respondent Nos.1 to 6 in collusion with Respondent No.10. It was on this basis that the Appellants claim the temporary injunction as it is their case that the predecessor of Respondent Nos.1 to 5 Aga Jamshed Framrose was entitled to the land bearing Survey No.15,

Hissa No.2/3/B admeasuring 1 Guntha only and not 4799 sq.mtrs. The Appellants claim to be in possession of Survey No.15, Hissa No.2/3/B since 1981. The Appellants, therefore, have prayed for a temporary injunction restraining the Respondents from carrying out the construction activity on the suit property.

6. Respondent No.6 entered into a Development Agreement of the property bearing Survey No.15, Hissa No.7/3 admeasuring 4799 sq.mtrs. with Respondent Nos.1 to 5. The terms and conditions of the Development Agreement were altered by mutual agreement on 22nd January 2002. Respondent No.6 acted upon these two Agreements and has also completed the entire construction on the suit property. The entire Floor Space Index (FSI) available has been consumed during the construction of the building. According to Respondent No.6, large amounts have been invested by it after securing loans from Banks and other creditors for carrying out the construction work of the site which is now known as Atharva Feryez Plaza. Twenty-eight shops, forty offices and twenty flats have already been constructed. 25% of the units have been booked and agreements have been executed in favour of the third parties.

7. It appears from the Plaint that the property has

been described by mentioning the boundaries of the property. The description of the suit property in paragraph 1 of the Plaint is as under :-

> "A. DESCRIPTION OF SUIT PROPERTY :
>
> All that piece and parcel of the land bearing erstwhile S.No.15, Hissa No.2/3/A, corresponding to the City Survey No.368, admeasuring "Acres 2.10 Gunthas" and Pot Kharaba admeasuring "Acre 0.04 Gunthas", thus in all admeasuring about "Acres 2.14 Gunthas" i.e. "Hectare 0.95.1 Ares" (9,510 sq.mtrs.), recently numbered at S.No.15, Hissa No.7/2, admeasuring "hector 0.93.84 ares" and Pot Kharaba admeasuring "hector 0.04 ares", thus in all admeasuring "hector 0.97.84 ares", assessed at Re.0.67 ps., situated at village Dhanakwadi, Taluka Haveli, Dist. Pune, within the local limits Pune Municipal Corporation and within the Registration District of Pune, Sub-Register, Haveli No.9 and which is bounded as under :
>
> On or towards East : Pune Satara Road.
> On or towards South : S.No.13, Hissa No.2.
> On or towards West : S.No.14.
> On or towards North : S.No.15, Hissa No.2/3/B (old)
> S.No.15, Hissa No.1/6 (new)"

It appears that the description of the property as per the document of title of the Plaintiffs i.e. the Appellants herein in the sale deed dated 17th September 1964 is not the same as that of the property described in paragraph 1 of the Plaint. The property has been described as Survey No.15 Hissa No.2/3/A which is bounded by the Government Road on the East, Survey No.40

on the South, Survey No.13 on the West and Survey No.15 Hissa No.2/3/B on the North admeasuring 2 Acres 14 Gunthas. The map which is annexed to the Agreement also shows the same boundaries.

8. Mr.Soni for the Appellants submits that the trial Court has not applied its mind to the facts before it and has held that the Appellants are not entitled to any temporary injunction. According to Mr.Soni, land bearing Survey No.15 Hissa No.2/3/B and Survey No.15/7/3 is part of the property owned by the Appellants being Survey No.15 Hissa No.2/3/A which is now numbered as Survey No.15/7/2. The Appellants claim that Survey No.15/7/3 is the new number allotted to the suit property which was originally Survey No.15/2/3B under Mutation Entry No.3844. On this basis, Mr.Soni submits that although the construction of the building appears to be complete, the status quo as of today should be maintained as the Appellants would greatly be prejudiced if third party rights are created by the Respondents by alienating or transferring the flats, shops or office premises in the newly constructed building. He relies on the judgment of the Single Judge of this Court in the case of *Smt.Sujala Yeshwant Nitsure and others* vs. *The Municipal Corporation of City of Pune and others*, **1996 (2) Bom.C.R. 503** and the judgment of the Division Bench

of this Court in the case of *Raja Bahadur Motilal & another* vs. *State of Maharashtra and others*, **2003 (1) Bom.C.R. 251**.

9. The Respondents, as stated earlier, have indicated that there is a discrepancy in the description of the suit property as mentioned in the Plaint, the sale deed dated 17th September 1964 and the map annexed to the sale deed. The Respondents submit that the suit itself is not maintainable as the earlier Suit which was filed against their predecessor-in-title for a permanent injunction has already been dismissed. According to the Respondents, the relief claimed in the earlier Suit was similar and it was found that the predecessor-in-title of Respondent Nos.1 to 5 herein had not trespassed upon the property of the Appellants. Therefore, the second Suit i.e. the present Suit is not maintainable. The Respondents have also brought to my notice the fact that although the Development Agreement was entered into between Respondent Nos.1 to 5 on the one hand and Respondent No.6 on the other hand, some time in July 2001. It was later modified in January 2002. The Appellants chose to remain silent and filed a Suit only sometime in October 2002. The Respondents have submitted that the Suit filed is frivolous and, therefore, no interim relief should be granted. Moreover, according to the Respondents, assuming that

the cause of action had arisen on 5th May 2002 when the Appellants noticed the advertisement in the newspaper, the Suit was filed five months later by which time a major portion of the building had been constructed. Therefore, according to the Respondents, the Appellants are not entitled to any equitable relief.

10. There is an obvious discrepancy between the properties which the Appellants have described in the Plaint and the property which is described in the sale deed of 17th September 1964. The sale deed describes the property as bounded by the Government Road on or towards the East which presumably is the Pune-Satara Road. However, on the South, the property is described as bounded by Survey No.14 in the sale deed, while Survey No.13, Hissa No.2 is mentioned in the Plaint. The map produced by the Plaintiffs i.e. the Appellants herein describes the property on or towards South by Survey No.13, Hissa No.3. On the West the description of the property has been given in the Plaint as Survey No.14 whereas in the sale deed and the map the suit property is stated to be bounded on the West by Survey No.13. On or towards the North, the suit property is bounded by Survey No.15, Hissa No.2/3/B(old) and Survey No.15, Hissa No.1/6 (new). However, this property has been described in the sale deed as Survey No.15/2/3/B

and the description in the map is Hissa No.1. Therefore, in my opinion, the Appellants would not be entitled to any relief based on a Plaint in which there are many discrepancies in the description of the property. The description of the property in the sale deed and map does not tally in any manner with the property of the Plaintiffs mentioned in the Plaint. The description of the property in the earlier Suit being Suit No.1725 of 1981 again is different. Therefore, the Appellants would have no right to the property which has been developed by Respondent No.6 on the basis of an agreement executed by it with Respondent Nos.1 to 5 being Survey No.15, Hissa No.7/3 admeasuring 4799 sq.mtrs. I am, therefore, of the view that the trial Court has committed no error while rejecting the application for temporary injunction.

11. Furthermore, as stated by the Respondents, the entire building has been constructed and flats have been conveyed and third party rights have been created. In my view, therefore, it would not be proper to set the clock back and to stay the sale of the flats. As stated by the Respondents, the property has been constructed by securing loans from the Banks and various other creditors. 25% of the units have already been booked and agreements have been executed in favour of third parties. In my view, therefore, it would not be proper

to grant any interim relief to the Appellants. The trial Court has committed no error while rejecting the application for temporary injunction. As held by the Apex Court in Wander Ltd. and another vs. Antox India P. Ltd., 1990 (Supp) SCC 727, the High Court should not interfere with the interim orders of the lower Court if there is no infirmity although a different view may be possible.

12. The Appeal From Order, therefore, is dismissed. No order as to costs.

13. Certified copy expedited.